

# Liberalising Trade in the EU and the WTO

A Legal Comparison

EDITED BY

Sanford E. Gaines

Birgitte Egelund Olsen

Karsten Engsig Sørensen

# LIBERALISING TRADE IN THE EU AND THE WTO

A Legal Comparison

Edited by

SANFORD E. GAINES

BIRGITTE EGELUND OLSEN

AND

KARSTEN ENGSIG SØRENSEN



**CAMBRIDGE**  
UNIVERSITY PRESS

# CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107471184](http://www.cambridge.org/9781107471184)

© Cambridge University Press 2012

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2012

First paperback edition 2014

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Liberalising trade in the EU and the WTO : a legal comparison / [edited by] Sanford E. Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen.

pages cm

Includes bibliographical references and index.

ISBN 978-1-107-01275-2

1. Foreign trade regulation. 2. International trade. 3. World Trade Organization. 4. European Union. I. Gaines, Sanford E. II. Olsen, Birgitte Egelund. III. Sørensen, Karsten Engsig.

K3840.L54 2012

382'.92-dc23

2012013672

ISBN 978-1-107-01275-2 Hardback

ISBN 978-1-107-47118-4 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

## LIBERALISING TRADE IN THE EU AND THE WTO

This comparison of EU and WTO approaches to common trade liberalisation challenges brings together 21 authors from Europe and America. Together they explore fundamental legal issues, such as the role of general principles of law, the role of the judiciary in the development of law, the effect of the principle of non-discrimination and the elimination of non-discriminatory barriers to trade. The contributions also examine the most recent developments in trade law across a full range of trade issues, including TBT and SPS, services, intellectual property, customs rules, safeguards, anti-dumping and government procurement. Adopting a comparative perspective throughout, this volume sheds light on today's trade law and suggests paths forward for each system through the perennial tensions between open, non-discriminatory trade and strongly held national values and objectives. This book is part of the research project 'WTO law and EU law: legal conflict and integration (2007–2011)' funded by the Danish Council for Independent Research, Social Sciences.

SANFORD E. GAINES is a guest professor at the Department of Law, Aarhus University, Denmark. His career has included service at a senior level at the Office of the US Trade Representative during the NAFTA and Uruguay Round negotiations.

BIRGITTE EGELUND OLSEN is a professor at the Department of Law, Aarhus University. She researches general issues of EU law and WTO law, specialising in environmental law and the interaction between trade and the environment.

KARSTEN ENGSIG SØRENSEN is a professor at the Department of Law, Aarhus University. His primary research areas are EU law and trade law, in particular the internal market, EU company law, EU competition law and WTO law.

## CONTRIBUTORS

AMIN ALAVI is Associate Professor and does research on WTO law and policy and EU external trade, with a focus on EU preferential trade agreements. Based on regime theory, his theoretical research combines legal analysis and inputs from international relations theory to focus on the processes of legalisation and the impact of institutional factors and different legal instruments on the functioning of legal regimes. He is the author of *Legalization of Development in the WTO* (2008) and several articles such as 'Preferential Trade Agreements and the Law and Politics of GATT Article XXIV' (2010) and 'On the (Non-)Effectiveness of the World Trade Organization Special and Differential Treatments in the Dispute Settlement Process' (2007). He teaches courses on WTO law and international relations at Aarhus University. He has also been working as consultant on WTO law and negotiations.

HENRIK ANDERSEN is Associate Professor at the Law Department, Copenhagen Business School. His research concerns international trade law and in 2009 he authored *EU Dumping Determinations and WTO Law*. He has also been participating in the EU Asia Inter University Network and contributed in 2010 to the research project 'Public-Private Partnerships – an international analysis from a legal and economic perspective' with the chapter 'Public-Private Partnerships and WTO Procurement Law'. Currently, he is working on a research project concerning the international rule of law in the context of WTO Appellate Body jurisprudence. In that respect he has taken research stays at City University of Hong Kong and at the European University Institute in Florence to discuss different legal cultural perspectives on the international rule of law.

HELLE TEGNER ANKER is Professor of Law at the Faculty of Life Sciences, Copenhagen University. She has specialised in environmental law, including matters relating to biodiversity, water and land use planning. She is co-author of the book *Legal Systems and Wind Energy: A Comparative Perspective* (2008) as well as other books and articles.

Professor Anker has recently participated in an expert committee on the Danish administrative appeal system in environmental matters. She is also coordinator of the Nordic Environmental Law, Governance and Science Network ([www.neln.life.ku.dk](http://www.neln.life.ku.dk)) and member of the board of the Master in Environmental and Energy Law.

ILONA CHEYNE is Professor at Oxford Brookes University specialising in WTO law, international and EU environmental law, and trade environment conflicts. Her recent publications include articles on labelling and the proportionality principle, the use of the precautionary principle in WTO and EU law, and law and ethics in trade environment disputes. She has been a visiting fellow at Cambridge and Michigan, and a guest professor at the Law Department of the Aarhus Business School. She is currently LLM Director for the Oxford Brookes LLM programmes in International Law, International Trade and Commercial Law and International Human Rights.

DOMINIC COPPENS is a post-doctoral researcher at the Leuven Centre for Global Governance Studies and Institute for International Law at the University of Leuven (KU Leuven). He specialises in international economic law, with a particular interest in development issues, and equally researches aspects of EU trade law. Dominic has studied law and economics at the KU Leuven, which involved one semester at New York University School of Law, and has been Visiting Scholar at Columbia Law School (New York). He served as an intern and junior legal officer at the WTO Legal Affairs Division and has taught the course on International Economic Law at the University of Kent in Brussels. His research has been presented at international conferences and the WTO Secretariat and has resulted in publications in several edited volumes as well as in peer-reviewed journals, including the *Journal of International Economic Law* and the *Journal of World Trade*. Dominic is completing a book with Cambridge University Press (2012) that explores whether the WTO disciplines on subsidies and CVDs spelled out under the SCM Agreement find an adequate balance between 'policy space' left to national governments and 'policy constraints' imposed upon them.

THOMAS COTTIER is Managing Director of the World Trade Institute and the Institute of European and International Economic Law, and a Professor of European and International Economic Law at the University of Bern. He directs the national research programme on trade law and policy (NCCR Trade Regulation: From Fragmentation to Coherence)

located at the WTI. He was educated at the University of Bern and the University of Michigan Law School, and was a visiting fellow at Cambridge University, UK. He taught at the University of St Gallen, Neuchâtel and the Geneva Graduate Institute in Geneva and also regularly teaches at the Europa Institut Saarbrücken, Germany, Paris I (Sorbonne), Turin University, Italy and Wuhan University, China. He was a member of the Swiss National Research Council from 1997 to 2004 and served on the board of the International Plant Genetic Resources Institute (IPGRI), Rome, during the same period. He served the Baker & McKenzie law firm as Of Counsel from 1998 to 2005. Professor Cottier has a long-standing involvement in GATT/WTO activities. He served on the Swiss negotiating team of the Uruguay Round from 1986 to 1993, first as Chief Negotiator on dispute settlement and subsidies for Switzerland and subsequently as Chief Negotiator on TRIPs. He was the Deputy Director General of the Swiss Intellectual Property Office and served as a member or chair of several GATT and WTO panels. Professor Cottier has written and publishes on a wide range of trade, European law and international law issues. His main research interests are in constitutional theory of multilevel governance and theory of international law, external relations of the EU, intellectual property, innovation and the challenges of climate change in international economic law.

BUGGE THORBJØRN DANIEL holds a Ph.D. from University of Copenhagen and is currently Associate Professor at University of Southern Denmark. His primary research areas are EU law and WTO Law and he is the author of the book *WTO Adjudication* (2005), co-author of the book *WTO Law – from a European Perspective*, co-author on a general book on EU law and author of a book on WTO dispute settlement. He has been responsible for setting up and teaching courses in WTO law at University of Copenhagen (2003 and 2009) and University of Southern Denmark (2005–), and in international law (2003–) and EU law (2005–) at University of Southern Denmark. He has acted as panellist in the regional round of the Elsa WTO moot court competition from 2005 to 2008 and has been responsible for coaching the University of Southern Denmark team in that competition since 2009.

MATTHEW JAMES ELSMORE is Associate Professor at the Department of Law, Aarhus University. His primary research areas are intellectual property law, EU law and trade law. He tends to conduct research by focusing on current issues that cut across substantive and procedural areas of law and have international impact, such as trade mark counterfeiting. He

also engages in comparative analysis, with a present emphasis on Chinese law and its legal system. Matthew features regularly in international peer-reviewed journals on a variety of law topics, ranging from IP to free movement of persons. He tries to adopt an interdisciplinary angle in his law-based research and teaching wherever possible, as in areas like patent law and innovation. This approach coincides with his teaching interests, which in particular cover his master courses in Law and Economics and Business Law in China.

SANFORD E. GAINES is a Guest Professor in the Law Department, Business and Social Sciences, Aarhus University. He has had a long career in legal practice, teaching and research in the United States, including service at a senior level at the Office of the US Trade Representative during the NAFTA and Uruguay Round negotiations. For the last fifteen years his scholarship has focused on issues of trade policy with a special emphasis on environmental issues, including articles in the *UCLA Law Review*, the *University of Chicago Legal Forum* and the *Review of European Community & International Environmental Law*. He served on and chaired the US national advisory committee relating to the North American Commission for Environmental Cooperation, and prepared or participated in two reports to that commission. He is a co-author of the only law teaching text on trade and the environment, *Trade and the Environment: Law and Policy*, now in its second edition (2011).

DYLAN GERAETS studied law at Maastricht University where he obtained his LL.B. in European Law in 2008. In 2009 he obtained his LL.M. in International Law at the same university. In the summer of 2009 he participated in the IEEM Academy of Trade and Investment Law in Macau, China. During his second master at the Maastricht Graduate School of Governance (M.Sc., 2010) he performed an internship at the Economic Affairs Department of the Permanent Representation of The Netherlands in Geneva. Prior to joining the Institute for International Law and the Leuven Centre for Global Governance Studies in October 2010, he served as an intern for the Trade Policy department of the Ministry of Economic Affairs in The Hague. Dylan is an assistant in international law and works under the supervision of Professor Jan Wouters.

PERNILLE W. JESSEN is Associate Professor at the Department of Law, Aarhus University. Her primary research areas are EU law and trade law, specialising in competition law, especially state aid and subsidy law, and data protection law. She has authored several contributions on the



subjects in national and international journals and books. Currently, she serves as a member of the Danish Competition Council. Moreover, she is programme director for the M.Sc. in Business Administration and Commercial Law at Aarhus University, a two-year full-time programme centering on law and economics.

CARSTEN WILLEMOES JØRGENSEN is Assistant Professor at the Department of Law, Aarhus University. He does research on EU customs law and WTO customs law. Before that he worked for several years for the Danish customs authorities. He was responsible for the first Customs Law course at Aarhus University (2006–).

PIETER JAN KUIJPER is Professor of the Law of International Organizations in the Law Faculty of the University of Amsterdam. Previously he has been Director of the Legal Affairs Division of the WTO Secretariat (1999–2002) and Principal Legal Adviser and Director of the External Relations and Trade team of the Legal Service of the European Commission (2002–2007).

MATTHIAS OESCH is Assistant Professor of European and International Economic Law at the University of Bern. Furthermore, he is a Senior Research Fellow at the World Trade Institute (WTI) and a lecturer at the University of St Gallen. Previously, he worked as legal counsel in the WTO Division of the Federal Department of Economics, Switzerland, having inter alia represented Switzerland before the WTO Appellate Body in the US – Steel case and in the DSU Review (2003–2005). He also worked, as attorney-at-law in a law firm in Zurich (2008–2010). He has written on WTO and EU trade matters and on Swiss law, including three books: *Standards of Review in WTO Dispute Resolution* (2003), *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland* (2005, co-authored with Thomas Cottier), and *Differenzierung und Typisierung: Zur Dogmatik der Rechtsgleichheit in der Rechtsetzung* (2008).

BIRGITTE EGELUND OLSEN is Professor at the Department of Law, Aarhus University. She does research on general issues of EU law and WTO law, specialising in environmental law and the interaction between trade and environment. She is co-author of the books *WTO Law – from a European Perspective* (2012) and *Regulation in the EU* (2006). She was responsible for setting up the first regular WTO Law course at Aarhus University (2005–), and directed the research project ‘WTO law and EU law: legal conflict and integration (2007–2011)’ funded by the Danish

Council for Independent Research – Social Sciences. In addition, Professor Olsen is the Director of the Executive Master in Environmental and Energy Law (MEEL) (a professional degree programme), and is a member of the Danish Energy Board of Appeal.

LAURA ROVEGNO is a Ph.D. Candidate at the Université Catholique de Louvain. She holds a Bachelor in Economics from the Universidad de la República in Uruguay and a Masters in Economics from the Université Catholique de Louvain. Her research interests are trade policy, firm performance and micro-econometrics. She has worked at the World Trade Organization providing research assistance for the 2009 World Trade Report on contingent protection measures.

KARSTEN ENGSIG SØRENSEN is Professor of EU Law at the Department of Law, Aarhus University. His primary research areas have been EU law and trade law, focusing on the internal market, EU company law, competition law and EU tax law. He is a co-author of the book *WTO Law – from a European Perspective* that has appeared in a new edition in 2012. He has authored several other books and articles and serves as co-editor of the SSRN Working Paper Series in Nordic and European Company Law. He is also programme director for the M.Sc. in EU Business and Law at Aarhus University, a two-year full-time programme focusing on EU law and economics.

MICHAEL STEINICKE is Professor of EU Law and Head of the Department of Law the School of Business and Social Sciences, Aarhus University. His primary research interest is international trade law, with a focus on free movement and competition issues regarding the relation between the state and the market (including public procurement law). He is co-author of the book *WTO Law – from a European Perspective* and other books on related issues in English and Danish and a number of articles as well. He has also been involved in a number of research projects on different trade and competition-related issues.

JOHAN VAN DE GRONDEN is Professor of European Law at the Law Faculty of the Radboud University Nijmegen (the Netherlands). He received his Ph.D. in 1998. His research interests concern European internal market law, competition law, the WTO rules on services, Services of General (Economic) Interest and the impact of EU law on health care. From 1998 until September 2007 he worked at the Europa Institute of the University Utrecht (the last years as a senior lecturer). On 1 September 2007 he was appointed as Professor of European Law at Nijmegen. Since

2010 he has been head of the Department of International and European Law of the Radboud University Nijmegen. He is also a deputy judge at the District Court Rotterdam, where he mainly handles competition law cases. He is also a member of the Committee of Consumer Affairs and of the Committee of International Social and Economic Affairs of the Dutch Social and Economic Council. Furthermore, he is a founding editor of the TMC Asser series *Legal Issues of Services of General Interest*.

HYLKE VANDENBUSSCHE is a Professor in International Economics and holder of the Chaire Jacquemin at the Université Catholique de Louvain. She held visiting positions at the University of Cambridge, Dartmouth College, Tilburg, Warwick, Leuven and LSE. Her research interests lie in trade, trade policy, competition issues, anti-dumping measures and firm performance. Her papers have been published in journals such as the *Journal of International Economics*, *European Economic Review*, *European Journal of Political Economy*, *Oxford Economic Papers*, *World Economy*, *Journal of World Trade* and others. She co-edited a book on *The WTO and Anti-Dumping* with Edward Elgar Publishers. She is a research fellow of the Centre for Economic Policy Research, London and a member of the Scientific Committee of the Midwest International Meetings and European Trade Study Group. She has collaborated on policy reports for the European Parliament and the UK Treasury. She has also been an advisor to the Ministry of External Affairs in Belgium since 2002.

JAN WOUTERS is Professor of International Law and International Organizations, Jean Monnet Chair *Ad Personam* EU and Global Governance and Director of the Leuven Centre for Global Governance Studies and the Institute for International Law at the University of Leuven (KULeuven). He is Visiting Professor at the College of Europe (Bruges), in the Master of Laws in International Economic Law and Policy (LL.M. IELPO, University of Barcelona), in the European Masters Degree in Human Rights and Democratisation (EMA, Venice) and in the Executive Master of European and International Business Law (M.B.L.-HSG, University of Sankt-Gallen). He is President of the Flemish Foreign Affairs Council, which advises the Flemish Government, and practises law as Of Counsel at Linklaters, Brussels. He is Member of the Royal Flemish Academy of Belgium for Sciences and Arts. He studied law and philosophy in Antwerp and Yale University (LL.M. 1990), was a Visiting Researcher at Harvard Law School and obtained his Ph.D. at KULeuven (1996). He taught at the Universities of Antwerp and Maastricht, was

Visiting Professor at Liège and Kyushu University and *Référendaire* at the European Court of Justice (1991–1994). He is Editor of the *International Encyclopedia of Intergovernmental Organizations*, Vice-Director of the *Revue belge de droit international* and editorial board member of ten international journals. He has published widely (around 400 publications including 35 books and 80 international journal articles). Recently he (co-)authored *inter alia* *The Europeanisation of International Law* (2008), *European Constitutionalism Beyond Lisbon* (2009), *Belgium in the Security Council* (2009) and *Accountability for Human Rights Violations by International Organizations* (2010).

## FIGURES

- 17.1 Average anti-dumping *ad valorem* duty levels  
by year of imposition     *page* 446
- 17.2 Number of anti-dumping initiations and measures  
between 1995 and 2009     449
- 17.3 Anti-dumping investigations by outcome,  
cases initiated between 1995 and 2008     451
- 17.4 Anti-dumping measures by type, cases initiated  
between 1995 and 2008     452
- 17.5 Evolution of the average duration (in months) of  
anti-dumping measures     456
- 17.6 Anti-dumping initiations by targeted countries, cases  
initiated between 1995 and 2009     459
- 17.7 Evolution of the number of anti-dumping initiations  
and measures by targeted country     460
- 17.8 Outcomes of EU anti-dumping initiations by  
targeted country     461
- 17.9 Anti-dumping initiations and measures by sector     462
- 17.10 EU anti-dumping initiations by sector and outcome,  
cases initiated between 1995 and 2008     463
- 17.11 EU anti-dumping initiations and measures by sector  
and targeted countries, cases initiated between  
1995 and 2009     464

## T A B L E S

- 17.1 Duration in months of anti-dumping measures  
imposed between 1995 and 2005     *page* 455
- 17.2 Anti-dumping initiations by targeted country, cases  
initiated between 1995 and 2009     457

## CONTENTS

*Notes on contributors* page vii

*List of figures* xv

*List of tables* xvi

### **PART I Introduction 1**

- 1 Comparing two trade liberalisation regimes 3  
SANFORD E. GAINES, BIRGITTE EGELUND OLSEN  
AND KARSTEN ENGSIG SØRENSEN

### **PART II Framework 19**

- 2 Negotiating in the shadow of good faith 21  
AMIN ALAVI
- 3 The influence of general principles of law 43  
JAN WOUTERS, DOMINIC COPPENS  
AND DYLAN GERAETS
- 4 The use of financial sanctions in response to  
post-litigation non-compliance 75  
BUGGE THORBJØRN DANIEL
- 5 The Court and the Appellate Body: between  
constitutionalism and dispute settlement 99  
PIETER JAN KUIJPER

### **PART III Comparative disciplines 139**

- 6 Direct and indirect discrimination in WTO and EU law 141  
THOMAS COTTIER AND MATTHIAS OESCH

7	Non-discriminatory restrictions on trade	176
	KARSTEN ENGSIG SØRENSEN	
8	Trade and social objectives	203
	SANFORD E. GAINES AND BIRGITTE EGELUND OLSEN	
9	The freedom to provide services	234
	JOHAN VAN DE GRONDEN	
	<b>PART IV Harmonisation needs – implicit and explicit</b>	<b>259</b>
10	Technical regulations and their notification	261
	KARSTEN ENGSIG SØRENSEN	
11	Rules on state aid and subsidies	288
	PERNILLE WEGENER JESSEN	
12	Consumer labelling in EU and WTO law	309
	ILONA CHEYNE	
13	The precautionary principle and beyond	333
	HELLE TEGNER ANKER	
14	Government procurement – can the WTO learn from the EU regime?	360
	MICHAEL STEINICKE	
15	Customs law: the challenge of non-centralised customs administrations in the EU	385
	CARSTEN WILLEMOES JØRGENSEN	
16	Comparing regulatory treatment of intellectual property at WTO and EU level	412
	MATTHEW J. ELSMORE	
17	Anti-dumping practices in the EU: a comparative analysis of rules and application in the context of WTO	440
	LAURA ROVEGNO AND HYLKE VANDENBUSSCHE	
18	EU safeguards applications and WTO law	467
	HENRIK ANDERSEN	
	<i>Index</i>	491



## PART I

---

### Introduction